Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01016/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 12 December 2013	**On 20 December 2013**
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Before

UPPER TRIBUNAL JUDGE MOULDEN

Between

MR N H
(Anonymity Direction Made)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Bonavero of counsel instructed by Trott and Gentry LLP
For the Respondent: Mr G Saunders a Senior Home Office Presenting Officer

DECISION AND DIRECTIONS

1. The appellant is a citizen of Somalia who was born on 23 February 1987. He has been given permission to appeal the determination of a panel (First-Tier Tribunal Judge Moore and non-legal member Mr G Sandall) which dismissed his appeal against the respondent's decision of 17 May 2013 to refuse to revoke

the deportation order made against him on 5 July 2012, to grant him asylum or leave to remain on human rights grounds.

2. The appellant arrived in the UK on 11 December 2003 when he was 16 years of age. In the light of later DNA testing the respondent has now accepted that he is the son of his claimed father and a member of the Bravanese minority clan. The appellant has lived here since his arrival. All his immediate family live here including his mother, father and brother. The appellant claimed to have a daughter M born in March 2011. He was no longer in a relationship with her mother, Miss S.

3. The appellant applied for asylum on 16 December 2003. On 4 February 2004 his claim was refused. He appealed and his appeal was dismissed as being out of time on 10 June 2004. The appellant applied for judicial review on 17 March 2005. There was a hearing on 13 December 2006 after which his appeal was declared invalid on 8 January 2007.

4. On 30 June 2008 at Waltham Forest Magistrates Court the appellant was convicted of possessing a Class C controlled drug, cannabis, and failing to surrender to custody. He received a six-month conditional discharge, was fined £50 and ordered to pay £70 costs.

5. On 4 October 2010 at Snaresbrook Crown Court the appellant was convicted on four counts of supplying a Class A controlled drug, heroin. He was sentenced to 30 months imprisonment.

6. On 29 October 2011 the appellant's representatives submitted further representations including a fresh asylum claim and claims for protection under Articles 2, 3 and 8. On 17 November 2011 he was served with a notice of liability to automatic deportation. The asylum claim was refused on 16 April 2012 and on 5 July 2012 he was served with a deportation order. The appellant appealed. His appeal was heard by Designated Immigration Judge Woodcraft who in a determination promulgated on 22 October 2012 dismissed his appeal. On 13 November 2012 permission to appeal to the Upper Tribunal was granted. In the determination promulgated on 1 February 2013 the decision to dismiss the deportation order was upheld. On 14 February 2013 the appellant sought permission to appeal to the Court of Appeal which was refused on 27 February 2013.

7. On 14 March 2013 the appellant's representatives submitted further representations including a DNA test. They asked for these to be considered as a fresh application for asylum. The respondent treated this is a request to revoke the deportation order which led to the decision of 17 May 2013.

8. The panel heard the appeal on 9 October 2013. Both parties were represented, the appellant by Mr Bonavero who appears before me.

9. The panel recorded that it was now accepted that the appellant was the son of his father and a member of the minority Brava clan. The panel agreed with the respondent's earlier conclusion that evidence submitted by the appellant had rebutted the presumption that he was a danger to the community.

10. The panel found that the appellant had not established that he was subjected to attacks in Somalia because of his membership of a minority clan, as he had claimed. The panel referred to the findings made by the Designated Immigration Judge in the earlier appeal hearing and concluded in paragraph 46 that his credibility was "fundamentally flawed". He had not established that he was entitled to asylum or that he would be at risk of serious harm if he was returned to Somalia. Returning him would not pose a real risk of infringing his Article 3 human rights. The panel went on to consider the Article 8 human rights of the appellant and his daughter M finding that they were in a genuine and subsisting relationship. She was a British citizen and it would be unreasonable to expect her to leave the UK. However, she could be cared for by her mother. The panel dismissed the appeal.

11. The appellant applied for and was granted permission to appeal by a judge in the First-Tier Tribunal. The grounds argue that the panel erred in law by making a flawed approach to serious harm as defined by Article 15 (c) of the Qualification Directive, made flawed findings of credibility by relying too heavily on the findings of the Designated Immigration Judge in the earlier appeal and adopting a flawed approach to the best interests of his daughter.

12. I find that the panel erred in law by confusing Articles 15(b) and (c). As appears from paragraph 15 the panel appreciated that the claim was being brought under Article 15 (c). Mr Saunders accepted that the panel might have done so but submitted that this would not have made any difference. The threshold was not so different that the appellant would have succeeded on either basis. I do not agree. AMM and others (conflict; humanitarian crisis; returnees; FGM) Somalia CG [2011] UKUT 00445 (IAC) states, at paragraph 4 of the summary;

> "Despite the suggestion in the judgment in Sufi & Elmi that there is no difference in the scope of, on the one hand, Article 3 of the ECHR (and, thus, Article 15(b) of the Qualification Directive) and, on the other, Article 15(c) of the Directive, the binding Luxembourg case law of Elgafaji [2009] EUECJ C-465/07 (as well as the binding domestic authority of QD (Iraq) [2009] EWCA Civ 620) makes it plain that Article 15(c) can be satisfied without there being such a level of risk as is required for Article 3 in cases of generalised violence (having regard to the high threshold identified in NA v United Kingdom [2008] ECHR 616). The difference appears to involve the fact that, as the CJEU found at [33] of Elgafaji, Article 15(c) covers a "more general risk of harm" than does Article 3 of the ECHR; that Article 15(c) includes types of harm that are less severe than those encompassed by Article 3; and that the language indicating a requirement

of exceptionality is invoked for different purposes in NA v United Kingdom and Elgafaji respectively."

13. In paragraph 46 the panel found that the appellant would not have a well founded fear of persecution in his home area and as a result, in paragraph 47, that he was not entitled to asylum. Immediately after and in the same paragraph the panel said that his removal would not cause the UK to be in breach of its obligations under the "Qualification Regulations". There is no indication that a different test was applied, as it should have been. In paragraph 48 the panel referred to the lack of "a risk of serious harm" and that as a result the appellant claim to humanitarian protection did not succeed. This indicates that the panel was considering Article 15 (b) not 15 (c). The only suggestion of any separate consideration of Article 15 (c) is in paragraph 45. However, this is done in the context of findings relating to the appellants claim under the Refugee Convention and does not amount to a clear 15 (c) conclusion which can be set against the flawed reasoning in paragraph 48. I do not agree with the grounds that suggest that the panel's reasoning in paragraph 45 amounted to a "perfect inversion" of the Tribunal's country guidance in AMM.

14. I find that the panel did not err in law by relying too heavily on the findings of the Designated Immigration Judge in the earlier appeal hearing. It was not said that Devaseelan principles were being followed or that the panel took his findings as their starting point. In the determination the panel recorded the important matters which had changed including the concessions made by the respondent. The panel were entitled to rely on the matters referred to in paragraph 40 which had not changed and still amounted to valid criticisms of the appellant's credibility. The reference in paragraph 52 to the appellant not wishing to see his daughter whilst he was in detention was, if it was an error of fact, not a material error in the context of the evidence that she never went to see him whilst he was in prison and only once whilst he was in immigration detention.

15. However, I find that the panel made an error of law by making no findings of fact or credibility in relation to the evidence of Miss S, the appellant's, father, mother or brother. In paragraph 58 the panel records that they gave oral evidence. I have seen the hand written record of proceedings prepared by the First-Tier Tribunal Judge who presided over the panel which sets out their evidence. This is an important error of law. Their evidence went to the question of whether there was any other family in Somalia and information about the appellant’s relationship with his daughter. In paragraph 58 the panel referred to the evidence given by the appellant’s family members to the Designated Immigration Judge but there is no reference or findings in relation to the evidence given to the panel.

16. I find that the panel erred in the approach to future contact between the appellant and his daughter in the statement; "the appellant could maintain any relationship with M by telephone or letter or by other modern methods of

communication" in the light of what is said by the President in LD (Article 8 best interests of child) Zimbabwe [2010] UKUT 278 (IAC).

17. The panel did not make an anonymity direction. I consider it necessary make such a direction in order to protect the interests of the appellant's young daughter.

18. I make an order under Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the appellant, his daughter, her mother or any member of his family.

19. Having found that the panel erred in law I set aside the decision. In the light of my conclusions as to the lack of findings of credibility or fact in relation to four witnesses the panel's findings of fact are not preserved. Bearing in mind the Senior President's directions I direct that the appeal be re-determined in the First-Tier Tribunal.

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Signed Date 18 December 2013

Upper Tribunal Judge Moulden